

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

DEBORAH SUE NICKE,  
  
Plaintiff/Appellee,

v.

KENNETH MICHAEL MILLER,  
AUTOMOTIVE RENTALS INCORPORATED,  
HIGH VOLTAGE MAINTENANCE CORPORATION,  
EMERSON ELECTRIC CO.,

Defendants/Appellants.

JUAN HERNANDEZ-MORENO and  
STATE FARM MUTUAL AUTO-  
MOBILE INSURANCE COMPANY,

Defendants.

Supreme Court Docket:  
No.  
Court of Appeals Docket:  
No. 263929  
Wayne County Circuit Court:  
Case No. 03-335375-NI  
Hon. Gershwin A. Drain

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**PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE  
TO APPEAL OF DEFENDANTS/APPELLANTS KENNETH MILLER, AUTOMOTIVE  
RENTALS, INC., HIGH VOLTAGE MAINTENANCE CORPORATION AND  
EMERSON ELECTRIC CO.**

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## **STATEMENT OF THE BASIS OF JURISDICTION**

Plaintiff DEBORAH SUE NICKE (“Plaintiff”) brought this action against Defendants for recovery of non-economic loss benefits under the no-fault statute. MCL 500.3135. On May 3, 2005, the trial court granted the motion for summary disposition of Defendants Kenneth M. Miller, Automotive Rentals, Inc., High Voltage Maintenance Corporation and Emerson Electric Co. (the “subject dispositive motion”), ruling that Plaintiff’s injury did not rise to the level of a “serious impairment of body function”. Plaintiff’s Motion for Reconsideration was denied on June 24, 2005. The trial court’s June 24, 2005 Order Denying Plaintiff’s Motion for Reconsideration represents a final order pursuant to MCR 7.203(A)(1)<sup>1</sup>.

Plaintiff timely claimed an appeal of right pursuant to MCR 7.203(A) and MCR 7.204 from the trial court’s granting of the subject dispositive motion and its denial of Plaintiff’s Motion for Reconsideration. Briefs were filed and oral argument entertained. On January 26, 2006, the Court of Appeals issued its Opinion and Order reversing the trial court’s grant of summary disposition to Defendants. Defendants/ Appellants filed their Application for Leave to Appeal to this Honorable Court on March 9, 2006.

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<sup>1</sup>Defendant, State Farm Mutual Automobile Insurance Company, was dismissed by stipulation, without prejudice or costs, on March 24, 2005. A Default Judgment Against [Defendant] Juan Hernandez-Moreno was entered on June 24, 2005.

**COUNTER-STATEMENT OF QUESTION PRESENTED**

Did the Court of Appeals correctly decide that the trial court erred by failing to consider and/or give proper weight to factors other than the “duration of the impairment” (*Kreiner* factor c) despite *Kreiner*’s requirement to consider multiple factors (including the non-exhaustive list of factors set forth in *Kreiner*) and given the evidence and the reminder of *Williams* and *McDaniel* that an impairment need not be permanent to satisfy the serious impairment threshold?

Plaintiff/Appellee answers “Yes”.

Defendants/Appellants would answer “No”

The Court of Appeals would answer “Yes”.



## STATEMENT OF FACTS

Plaintiff was injured in a motor vehicle accident involving Defendants on November 29, 2000 on westbound I-96 in Wayne County, Michigan (the “subject accident”). She had stopped for traffic when she was rear-ended by Defendants’ 1998 Ford E-350 commercial cutaway van [Exhibit A(1-3)].<sup>2</sup>

Prior to the subject accident, Plaintiff had undergone a cervical discectomy and fusion at C4-C5 (Exhibit H 1-3). According to the medical records, “[h]er neck, arm and shoulder pain ha[d] dissipated since the operative decompression” and she “progressively increase[d] her activities” (Exhibit H-4). An x-ray taken November 2, 1999 (about one year before the subject accident) showed only spurring at C5,6 and 7 (Exhibit H-5). She saw Dr. Lawley as a result of a December 26, 1999 slip and fall where she had a recurrence of neck pain (Exhibit I-3). A January 31, 2000 MRI **failed to disclose** a herniated disc at C5-6 or C6-7 (Exhibit I-4 – emphasis added) and instead demonstrated only posterior osteophytes and mild stenosis (Exhibit I-5).

In February of 2000, Dr. Louis Jacobs found “**no evidence** of herniated disc” at C5-6 or C6-7 and referred Plaintiff for pain management (Exhibit J-1 and J-2 – emphasis added). By August 3, 2000 (approximately four months before the subject accident) Plaintiff was “getting lasting relief following two diagnostic medial branch nerve blocks and cervical facet joints \* \* \*” performed by Michigan Pain Management Consultants, P.C. (Exhibits K-1 and K-2).

Prior to the subject accident, Plaintiff also had treated with Dr. Jeffrey Lawley for right shoulder complaints. An MRI of her right shoulder showed evidence of a “partial thickness

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<sup>2</sup>All exhibits identified in this Statement of Facts or elsewhere, unless otherwise noted, refer to the same lettered and numbered exhibit attached to Plaintiff’s Answer in opposition to the subject dispositive motion and filed with Appellant’s Brief pursuant to Administrative Order 2004-5

rotator cuff tear.” The doctor thought this condition was “not operative” and gave her a prescription for physical therapy and home exercise (Exhibit I-1). A December 16, 1998 MRI (taken about 2 years before the subject accident) indicated “a complete tear of the rotator cuff is **not** identified” (Exhibit I-2 – emphasis added). By January of 2000, Plaintiff only had “minimal to slight pain involving the right shoulder” (Exhibit I-3). Upon her discharge from physical therapy at Michigan Pain Management Consultants, it was noted her “shoulder and proximal arm pain is **significantly improved**” (Exhibit K-3 – emphasis added).

However, the stability and improvement Plaintiff had achieved in her neck and shoulder prior to the subject accident was wiped out in an instant on November 29, 2000 by Defendants’ negligence. Within hours of the subject accident, she presented to the Garden City Hospital emergency room with a history of the accident and having received a whiplash type motion to her neck and upper back. Her pain and limited range of motion had increased throughout the day. Physical examination and x-rays resulted in a diagnosis of post-motor vehicle accident cervical strain with a history of cervical fusion with degenerative joint and disc disease (Exhibit L-1, L-2 and L-3).

Plaintiff presented herself to her family physician, Dr. Deborah Kay, on December 1, 2000 (Exhibit M). Dr. Kay referred Plaintiff to physical therapy at TheraMatrix (Exhibit N). There she underwent an evaluation and eighteen (18) visits for physical therapy, therapeutic exercise, ultrasound and manual therapy treatments between December 5, 2000 and March 13, 2001 (Exhibit N-2).

Plaintiff’s continuing complaints led Dr. Kay to refer Plaintiff to Dr. David A. Simpson for an EMG on March 7, 2001 (Exhibit O-1). The EMG was **abnormal** (Exhibit O-2). Dr. Simpson thought Plaintiff had mono-neuropathy of her wrist with focal demyelination and

thought Plaintiff could benefit from an MRI (Exhibit O-2). At the referral of Dr. Kay, Plaintiff was evaluated by Dr. Jeffery E. Lawley (Exhibit P-1) who concurred with the recommendation for an MRI and with Dr. Kay's treatment plan (Exhibit P-2).

A May 11, 2001 MRI disclosed that Plaintiff had suffered a **herniated disc at C5-C6** as a result of the subject accident along with posterior osteophytes and disc bulge at C6-C7 (Exhibit Q-1). On June 26, 2001, Plaintiff presented herself to Dr. Louis Jacobs who reviewed the MRI films and confirmed that Plaintiff had suffered a disc herniation at C5-C6 (Exhibit R-1). Dr. Jacobs recommended that Plaintiff continue conservative therapy and go to a pain clinic where she had success in the past (Exhibit R-2).

On July 10, 2001 Plaintiff presented herself to Michigan Pain Management Consultants, P.C. complaining of constant cervical pain (especially with movement) and upper *left* extremity pain and weakness with left arm numbness and pins and needles. She gave a history of taking medication including Flexeril and Vicodin. Physical examination showed she was provocative at C5 and had spasm in the paraspinals, trapezius, and levator scapulae muscles (Exhibit S-2). Plaintiff underwent a series of four epidural injections in August and early September, 2001 (Exhibit S-3, S-4 and S-5). She reported only temporary relief with continued problems at C5-C6 with radiating pain. Dr. Simpson believed Plaintiff should be reevaluated by a neurosurgeon (Exhibit S-6).

Plaintiff sought a second opinion and evaluation from neurosurgeon Dr. Teck Mun Soo on November 1, 2001. She gave him a history of her neck pain becoming more intense with pain radiating down her left arm with numbness in the fourth and fifth fingers following the subject accident. She reported difficulty, weakness and problems with combing her hair and frequently dropping objects. She would wake up at least three times a night with back pain (Exhibit T-1).

After a physical examination and personal review of the MRI films, Dr. Soo diagnosed **two herniated discs at C5-6 and C6-7**. Plaintiff stated she had “no quality of life” and was limited with any activity. Dr. Soo offered her surgery (Exhibit T-2). On November 21, 2001, Dr. Soo performed on Plaintiff an **anterior cervical discectomy at C5-C6 and C6-C7 with bilateral foraminotomy and internal fusion at C5-6 and C6-7 with instrumentation and plating** (Exhibit U-1 and U-2).

Plaintiff continued to suffer from right shoulder pain (Exhibit V). On January 8, 2002, she returned to Dr. Lawley with complaints of right shoulder pain and was diagnosed with impingement syndrome (Exhibit W-1). Dr. Lawley referred Plaintiff to TheraSport for physical therapy (Exhibit W-2). Dr. Kay referred her back to Dr. Soo for an neurologic examination (Exhibit W-3). Dr. Soo thought it was impingement syndrome and that she should have another MRI (Exhibit W-3).

On January 29, 2002, Plaintiff had an MRI of her right shoulder. This showed a “**full thickness tear** of the supraspinatus tendon” and “fraying and superficial tearing of the posterior-superior labrum” (Exhibit W-5 and W-6 – emphasis added). She returned to Dr. Lawley on February 5, 2002 (Exhibit X-1). He recommended, and then performed on February 21, 2002, an open acromioplasty to repair the **torn rotator cuff** of her right shoulder (Exhibit X-2,3 & 4).

Plaintiff returned to Dr. Lawley for post-operative visits (Exhibit Y-1, Y-2, and Y-3) and underwent physical therapy for her right shoulder (Exhibit Y-5 and Y-6). She continued to complain about her neck and shoulder, so on September 30, 2003 she sought the services of Dr. Maury R. Ellenberg (Exhibit AA-1). Dr. Ellenberg thought Plaintiff needed to get back on medication therapy (Vicodin HP) (Exhibit AA-2) and he ordered another EMG for her (Exhibit AA-3).

Plaintiff testified she led a very active lifestyle before the accident and is unable to perform many of the activities she routinely performed before the accident (Deposition of Deborah Nicke, p. 168). For example, she can no longer draw, garden, hike, boat, exercise or take care of her niece and nephews (Deposition of Deborah Nicke, p. 168-188). Today, she **cannot** lift, bend, stoop, squat, sit, reach, pull, push, rotate or tilt her neck, lift her arm forward, to the side or back, make meals, open heavy drawers, sit or stand comfortably, dust, vacuum, scrub or clean her bath or kitchen, carry laundry or groceries, cut her lawn, tend her garden, enjoy life on a daily basis, live each day without worrying about what the future holds for her, or live each day without taking muscle relaxers, pain medication and anti-depressants [Exhibit CC (1-10)].

At the time of the subject accident, Plaintiff was employed by GMAC as a customer service specialist. This was a **sedentary** job that did not require her to perform heavy labor. Plaintiff sat in a chair all day answering the telephone and typing on a computer (Deposition of Deborah Nicke, p. 43-46). She missed three weeks from her sedentary job immediately following the subject accident (Deposition of Deborah Nicke, p. 89). Plaintiff discontinued her employment with GMAC at the end of September of 2001 – shortly before undergoing the neck fusion surgery by Dr. Soo and the rotator cuff repair surgery by Dr. Lawley (Deposition of Deborah Nicke, p. 44). After recovering from these surgeries, she obtained another sedentary job in October of 2002 as a payroll manager at Miserendino and Company until she was terminated in August, 2004 (Deposition of Deborah Nicke, p. 25-26).

## ARGUMENT AND AUTHORITY

**THE COURT OF APPEALS DID NOT “CREATE AND IMPOSE” ANY “SEPARATE AND INDEPENDENT DUTY” UPON THE TRIAL COURT WHEN THE COURT OF APPEALS REVERSED AND REMANDED THIS CASE BUT, RATHER, REITERATED AND APPLIED PRECEDENT REQUIRING CONSIDERATION OF MULTIPLE FACTORS WHEN IT HELD THE TRIAL COURT FAILED TO CONSIDER WHETHER PLAINTIFF SUSTAINED A “TEMPORARY” SERIOUS IMPAIRMENT OF BODY FUNCTION.**

### **A. Standard of Review**

The Court reviews de novo a trial court’s ruling to either grant or deny a motion for summary disposition. Kreiner v Fischer, 471 Mich 109, 129 (2004). Questions of statutory interpretation are likewise reviewed de novo. Id.

The standard of review for a decision on a motion brought pursuant to MCR 2.116(C)(10) is laid out in Smith v Globe Life Insurance Company, 460 Mich 446, 454-455 (1999):

“In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4)

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. Neubacher v. Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Id. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. McCart v. J. Walker Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. McCormic v. Auto Club Insurance Association, 202 Mich App 223, 237; 507 NW2d 741 (1993).”

“A genuine issue of material fact exists when the record, giving the benefit of reasonable

doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”

West v General Motors Corp, 469 Mich 177, 183 (2003).

In the instant case, the affidavits, pleadings, depositions, admissions, and documentary evidence filed support Plaintiff’s contention that she suffered a serious impairment of an important body function, which was objectively manifested, and which affected her general ability to lead her normal life. The Court of Appeals differed with the trial court’s analysis of the evidence and correctly determined that the trial court erred when it granted summary disposition in favor of Defendants. Therefore, this Honorable Court ought to deny Defendants’ Application for Leave to Appeal the Court of Appeals’ January 26, 2006 decision reversing the trial court’s grant of summary disposition to Defendants and remanding this matter to the trial court for further proceedings.

**B. Serious Impairment**

Section 3135 of the Michigan No-Fault Act (MCL §500.3135) provides in pertinent part:

“(1) A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all the following applies:

- (a) The issue of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
  - (i) There is no factual dispute concerning the nature and extent of the person’s injuries.
  - (ii) There is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the termination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

\* \* \* \*

(7) As using this section, “serious impairment of body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”

Thus, the statutory definition of serious impairments has three requirements:

- (1) The injury is objectively manifested;
- (2) impairs an important body function; and
- (3) affect plaintiff’s general ability to lead his or her normal life.

“This statutory threshold is designed to eliminate suits based on clearly minor injuries and those that do not seriously affect the ability of the body to function.” See DiFranco v Pickard, 427 Mich 32, 60 (1986); May v Sommerfield, 239 Mich App 197 (1999). However, an injury does not need to be permanent in order to constitute a serious impairment of body function. Williams v Medukas, 266 Mich App 505, 508 (2005); Kern v Blethen-Coluni, 240 Mich App 333, 341 (2000). Impairments of a short duration can be sufficient to meet the serious impairment threshold. Kreiner v Fischer, 471 Mich 109, 134 (2004).

Whether a plaintiff has suffered a serious impairment of body function is a question of law if the court determines “that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function”. MCL §500.3135(2)(a)(i) and (ii); Kreiner, supra, at 132. When making this determination, the trial court must make specific factual findings as to whether a material factual dispute exists regarding the nature and extent of plaintiff’s injuries. May, supra, at 199. If no factual dispute exists, then summary disposition should be granted. Kreiner, supra, at 132.

Interpreting MCL §500.3135, this Court in Kreiner outlined a multi-step analysis to



provide trial courts a framework for determining whether a plaintiff's allegation sufficiently meet the "serious impairment of body function" threshold for third-party tort recovery. Kreiner, supra, at 133-134. "The starting point in analyzing whether an impairment affects a person's 'general', i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much and for how long". Id.

"First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, and they continue to the next step.

\* \* \* \*

"Second, if the court can decide the issue as a matter of law, this must next determine if an 'important body function' of the plaintiff has been impaired...[If yes,] it must then determine if the impairment is objectively manifested...[If yes,] it must then determine if the impairment affects plaintiff's general ability to lead his or her normal life. Id.

#### **i. Objective Manifestation**

The phrase "objective manifestation" is not specifically defined within the No-Fault Act. In Kreiner, this Court stated "subjective complaints [concerning impairments] that are not medically documented are insufficient [to meet the threshold of being objectively manifested]". Id. at 132. This Court chose not to further define the phrase "medically documented"; therefore, the phrase "objective manifestation", as defined in Jackson v Nelson, 252 Mich App 643, 652-653 (2002) and DiFranco, supra, as "medically identifiable and having a physical basis" remains undisturbed. The current threshold for objective manifestation will be met if a doctor or other qualified medical person diagnosed an injury or impairment.

An impairment can be objectively manifested by an x-ray, Sherrell v Bugaski, 140 Mich App 708, 711 (1984), other objective tests such as an MRI or an EMG, Kreiner, supra at 518 n.4,

passive range of motion tests, Shaw v Martin, 155 Mich App 89, 96 (1986), or muscle spasm, Franz v. Woods, 145 Mich App 169, 175-176 (1985).

The objective nature of Plaintiff's injuries were amply demonstrated by the abnormal EMG (Exhibit O-2); the May 11, 2001 MRI (Exhibit Q-1 disclosing herniated discs at C5-C6 and C6-C7), the January 29, 2002 MRI (Exhibit W-5 and W-6) disclosing a full thickness tear of the supraspinatus tendon and fraying and tearing of the posterior-superior labrum, and (most importantly) the surgical repairs of her neck and shoulder that irrefutably confirmed the presence of such post-accident conditions in Plaintiff.

Although Defendants claim Plaintiff's post-accident diagnoses related to pre-existing conditions, the medical evidence submitted supports the conclusion that the November 29, 2000 accident caused serious and significant injury to Plaintiff (herniated discs at C5-C6 and C6-C7 and a full thickness tear of the supraspinatus tendon on her right shoulder). In addition, Plaintiff testified at deposition that she was extremely active before this accident (Deposition of Deborah Nicke, p.168) and treater Dr. Louis Jacobs found "no evidence of disc herniation" at these levels prior to the accident (Exhibit J-1 and J-2).

**ii. Important Body Function**

The term "important body function" is not defined within the No-Fault Act. However, movement of the neck and back have been found to be important body functions. McDaniel v Hemker, 268 Mich App 269 (2005); Harris v LeMichcex, 152 Mich App 149 (1986); Mekler v Bingham, 147 Mich App 716 (1985); and Washington v Van Buren Road Commission, 155 Mich App 527 (1986). Similarly, the proper functioning of one's shoulder is deemed an important body function. McDaniel, supra; Ulrey v. Coy, 153 Mich App 551 (1986); Burk v Warren (after remand), 137 Mich App 715 (1984); and Arabo v Turnbull, 157 Mich App 575

(1986). In McDaniel, supra at 282, a post-Kreiner case, the Court of Appeals held plaintiff McDaniel sustained a serious impairment of body function as a matter of law, noting that the “nature of the [subject] impairment relates to cervical damage resulting in pain in and limited use of McDaniel’s back, shoulder, neck, and head, **which come into play in almost any activity or movement**” (emphasis added). Plaintiff’s neck and shoulder function certainly qualify as important body functions. Injuries to neck and shoulder, and impairment of the neck and shoulder, come into play in almost any activity or movement.

### **iii. General Ability to Lead Her Normal Life**

Determining “whether a plaintiff is ‘generally able’ to lead her normal life requires considering whether the plaintiff is, ‘for the most part able to lead her normal life’.” Kreiner, supra, at 130. The determination of “normal life” requires a subjective determination of what is ‘normal’ based on an analysis of the plaintiff’s own life, and is not a determination based on an objective standard based on a hypothetical “average person’s” life. Once the analysis of the impact on the plaintiff’s life is determined, then “it is to be objectively determined whether the impairment in fact affects the plaintiff’s ‘general ability to lead’ that life”. Id. at 121 n7. Thus, an analysis of pre- and post-collision lifestyles is required. If the analysis reveals that the course or trajectory of the plaintiff’s normal life has been affected, then the plaintiff’s ‘general ability’ to lead his normal has been affected and he meets the ‘serious impairment of body function’ threshold”. Id. at 131.

The application of this prong warrants a historical look back to Cassidy v McGovern, 415 Mich 483. Because of this Court’s footnote decision in *Kreiner*, “[a]s should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the legislature largely rejected *DiFranco* in favor of *Cassidy*”. Kreiner at 121,

n8. However, combined with the court's new, lower standard expressed in *Kreiner* (subjective determination of what is plaintiff's normal life thus rejecting the "objective person" analysis under *Cassidy*), a scale is created with *Cassidy* the ceiling and *Kreiner* the floor. Thus, injuries found to be serious impairments as a matter of law under the objective person test of *Cassidy* clearly meet the lower subjective person test threshold under *Kreiner*.

This Court in *Kreiner* provided a list of five non-exhaustive factors to assist trial courts in evaluating whether a Plaintiff's "general ability" to conduct the course of his or her normal life has been effected;

- (a) the nature and extent of the impairment,
- (b) the type and length of treatment required,
- (c) the duration of the impairment,
- (d) the extent of any residual impairment, and
- (e) the prognosis for eventual recovery.

Id. at 133 (quoting DiFranco, supra, at 67-70). This Court went on to note that these factors are non-exclusive and they are not individually dispositive. Id.

#### **iv. Companion Cases**

##### **Published Cases**

In *Kreiner*, this Court considered two cases consolidated for appeal: **Kreiner v Fischer and Straub v Collette** (471 Mich 109 (2004)). The *Kreiner* case involved a low back injury. Plaintiff Kreiner did not miss one day of work. He had three weeks of physical therapy. He never treated at a hospital. He never had any invasive procedure. He claimed that he could only work six hours a day instead of eight hours a day. He could not stand on a ladder longer than 20 minutes, or lift more than 80 pounds. He could still deer hunt, he could not rabbit hunt. This

Court ruled plaintiff did not sustain a serious impairment.

The *Straub* case involved a broken little finger and injury to the tendons in plaintiff's ring and middle fingers of his non-dominant hand. Straub had outpatient surgery to repair the tendons. He had no medical treatment for the broken bone. He wore a cast for one month. He took pain medication for two weeks, and completed a physical therapy program. He was back to work part time within two months of the injury, and full time three weeks later. He was unable to play guitar for his band for four months after the injury. The Court ruled no serious impairment.

Subsequent to the release of *Kreiner*, the Court of Appeals decided Williams v Medukas, 266 Mich App 505 (2005). In Williams, plaintiff had sustained a fractured right shoulder and a fractured left hand but returned to work and to a position as basketball coach some three months after the injury causing accident. The trial court had granted defendant summary disposition, concluding that an impairment lasting no more than three months did not meet the threshold definition of a serious impairment of body function.

The Williams Court reversed, observing:

“An injury need not be permanent in order to be serious. *Kern v Blethen-Coluni*, 240 Mich App 333, 341, 612 NW2d 838 (2000). Furthermore, an impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff's life is extensive. *Kreiner, supra* at 134, 638 NW2d 611.”

In Williams, an orthopedic surgeon had placed plaintiff's left arm in a cast and immobilized his right arm with a double sling. For one month following the accident, plaintiff's arms were immobilized, and his wife was required to assist him with his needs, including dressing, eating, and performing hygiene functions. Thereafter, plaintiff could feed himself and attend to his basic hygiene needs. After plaintiff returned to work, some three months after the accident, plaintiff restricted his activities playing/coaching basketball, playing golf, and playing

with his grandchildren.

The Williams Court specifically noted that, although no evidence showed plaintiff's physician restrict him from engaging in various recreational activities, and, although self-imposed restrictions will not establish a residual impairment (Kreiner, supra at 133 n. 17), plaintiff's physician did indicate that plaintiff lacked full range of motion in his left wrist and that his right shoulder was healing in such a way that its range of motion would be permanently limited. The Williams Court held that, as a matter of law, plaintiff had sustained a serious impairment of and the trial court erred when it granted summary disposition for defendant. M.C.L. §500.3135(2)(a).

In Moore v Cregeur, 266 Mich App 515 (2005), the Court considered a case where plaintiff suffered a permanent right eye injuries including a loss of visual acuity, a deterioration in her vision to 20/60, and a partial loss of peripheral vision. Although agreeing with defendants that plaintiff could still perform virtually every activity that she performed before the accident (albeit with the aid of adaptive devices and some retraining), the Court of Appeals observed that "it is also self-evident that plaintiff's vision loss will affect every aspect of her waking life to some extent". The Court held that, as a matter of law, the plaintiff's vision loss constituted a serious impairment of body function.

In McDaniel v Hemker, 268 Mich App 269, 707 NW2d 211 (2005), leave to appeal to this Court denied March 8, 2006 (docket no. 129843), the Court of Appeals considered a case where the plaintiff sustained back, shoulder, neck, and head injuries but was only out of work for about six to seven months, required no surgery (physician affidavit indicating there is no surgery to repair plaintiff's ligament damage or realign vertebrae), and received physician imposed restrictions based generally upon pain. The trial court granted defendant's motion for summary

judgment, finding that plaintiff “does not have a residual impairment as a matter of law because her impairment is a self-imposed restriction based on real or perceived pain”, which, according to the trial court, did not suffice the requirements stated in Kreiner, supra at 133, n. 17. The McDaniel Court reversed, observing:

“The nature of the impairment relates to cervical damage resulting in pain in and limited use of McDaniel’s back, shoulder, neck, and head, which come into play in almost any activity or movement. *Kreiner*, *supra* at 133, 683 NW2d 611 (factor a). The type of treatment is extensive and involves pain medications, nerve blocks, muscle relaxers, and physical therapy, and, regarding the length of treatment, it is ongoing and will continue into the foreseeable future. *Id.*, at 133, 638 NW 2d 611 (factor b). With respect to the duration of the impairment, [the physician]’s affidavit indicates that it will in all likelihood be permanent and not subject to surgical correction, and the prognosis for eventual recovery is poor. *Id.* (factors c and e).

McDaniel, at 282. With respect to factor d, the Court of Appeals, interpreting footnote 17 (Kreiner, supra at 133, n. 17), held that:

“[I]f there are physician-imposed restrictions based on real or perceived pain, footnote 17 does not require that the doctor offer a medically identifiable or physiological basis for imposing restrictions.”

McDaniel, at 284. The Court also held “evidence regarding restrictions is not the only way to establish the extent of any residual impairment. [The physician’s] expert statements and opinions themselves regarding [plaintiff’s] medical condition and the likelihood that [plaintiff’s] condition is permanent can be utilized to show the extent of the residual impairment.”

After the McDaniel Court stressed that *Kreiner* requires consideration of the totality of the circumstances, the Court of Appeals held that plaintiff McDaniel had suffered the necessary threshold serious impairment of body function under MCL §500.3135, and reversed the grant of summary disposition to defendant.

Plaintiff asks this Court to observe that Defendants fail to cite or address these published post-*Kreiner* decisions. Plaintiff suggests that Defendants fail to cite or address these decision

because the development of *Kreiner* contained therein supports the Court of Appeals' January 26, 2006 Opinion and Order.

### **Unpublished Cases**

**Luther v Morris**, unpublished per curiam decision of the Court of Appeals, decided January 18, 2005 (Docket No. 244483). Luther suffered a right elbow fracture dislocation and missed 52 days of work. Her arm was supported by a sling, she was dependent on her sister, and could not drive for several weeks. She could not engage in many common activities requiring the use of her dominant arm. Within "a couple on months of the accident," she was essentially able to return to her normal life. The Court held that Ms. Luther suffered a serious impairment:

"Thus, although the impairment was short-lived, the impairment left plaintiff virtually unable to do anything for herself, or to undertake tasks in the same manner as she had done before the injury; the impairment was extensive."

**Ream v Burke Asphalt Paving, et al, On Remand**, unpublished per curiam decision of the Court of Appeals, decided February 1, 2005 (Docket No. 238824); leave to appeal denied 474 Mich 888 (2005). Ream suffered multiple abrasions and contusions to his right lower shin and ankle, right wrist abrasions and contusions, and injury to his lower spine, and the tearing of the head of his right biceps tendon. He was not able to work for two months. He wore a walking cast for "some time." At the time of trial, he could not hunt or fish due to his inability to walk over uneven terrain without difficulty and pain, and he could not play softball. He will have to take anti-inflammatory medication "indefinitely." There was no surgery. There was some residual impairment of pain in his big toe. The Court of Appeals held that Ream suffered a serious impairment.

**Benner v Mini**, unpublished per curiam decision of the Court of Appeals (Judge Schuette dissenting), decided June 28, 2005 (Docket No. 261138). Benner suffered a back injury which



remained unresolved. He underwent several months of physical therapy, which was unsuccessful, and treatment with drug therapy. He was off work for eight months then cleared to return to work with pushing, pulling, lifting and bending restrictions. He became depressed and began sleeping on the floor with a cervical collar to alleviate the pain. The Court of Appeals held that Benner suffered a serious impairment.

**Casey v Clowers**, unpublished per curiam decision of the Court of Appeals, decided October 27, 2005 (Docket No. 262142); leave to appeal denied \_\_\_\_ NW2d \_\_\_\_ (Supreme Court Docket No. 130024, March 27, 2006). Casey suffered back and shoulder injuries which kept him from working for about three years. When he went back to work, he returned to full-duty work without restrictions. According to the trial court, an impairment did not meet the threshold unless the change in plaintiff's life was permanent. The Court of Appeals held that Casey suffered a serious impairment, noting that, because the deficiency in the evidence identified by the trial court is inconsistent with the interpretation of MCL 500.3135(7) in Williams and Kreiner, the trial court's order granting summary disposition to defendant was error.

**Pingle v Powers**, unpublished per curiam decision of the Court of Appeals, decided November 10, 2005 (docket No. 263714). Pingle suffered injuries consisting of thoracic disc protrusions (MRI) and carpal tunnel syndrome (EMG) and treated with physical therapy. Although Pingle received no physician-imposed restrictions on his employment activities, he presented evidence that his injury diminished physical capacity prevented him from working. About a year and a half after the accident, Pingle underwent nerve decompression surgery on both elbows. The Court of Appeals held that the presentation of such evidence was sufficient to create a question of fact regarding the existence of a serious impairment and reversed the trial court's grant of summary disposition to defendant.

**Kornacki v Gurden**, unpublished per curiam decision of the Court of Appeals, decided February 16, 2006 (Docket No. 257646). Kornacki suffered injuries to his wrist. He spent nine months undergoing operations and having his wrist in a cast. Both Kornacki and his physician asserted that Kornacki would experience significant wrist pain and limited range of motion permanently. Because of his injuries, Kornacki took a job with less pay and limited his daily activities. The Court of Appeals held that Kornacki suffered a serious impairment.

**Cornett v Bowman**, unpublished per curiam decision of the Court of Appeals, decided March 14, 2006 (Docket No. 264248). Cornett suffered fractures to his left foot and arthritis in his left foot and ankle. His injuries were permanent and he was likely to require wearing a brace on his foot for the rest of his life. The trial court found no serious impairment based in large part on Cornett's testimony that he was able to perform all his duties at work. The Court of Appeals looked to Cornett's constant pain and the effect the injury had on Cornett's walking ability and held that Cornett suffered a serious impairment.

**C. Analysis**

**1. Plaintiff met the "*Kreiner* Criteria".**

In order for the trial court to apply the *Kreiner* standard it must determine that there exists "no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function". *Kreiner, supra*, at 132. A clear reading of the transcript of the oral argument on Defendants' motion for summary disposition discloses the trial court failed to make the required relevant findings (see transcript pgs 17-19) even though the issue was preserved within Plaintiff's answer to Defendants' motion (pgs. 11-12) and in oral argument (see transcript pgs. 11 (lines 3-8), 12 (lines 19-21) and 14 (lines 18-22)).

Plaintiff presented evidence that her injuries caused a significant and diminished “general ability” to conduct the course of her normal life including evidence which addressed each of Kreiner’s five (non-exhaustive) factors:

- (a) the nature and extent of the impairment,
- (b) the type and length of treatment required,
- (c) the duration of the impairment,
- (d) the extent of any residual impairment, and
- (e) the prognosis for eventual recovery.

*Id.* at 133 (quoting *DiFranco, supra*, at 67-70).

Plaintiff sustained herniated discs at C5-C6 and C6-C7 (Exhibit Q-1) requiring an anterior cervical discectomy at C5-C6 and C6-C7 with bilateral foraminotomy and internal fusion at C5-6 and C6-7 with instrumentation and plating (Exhibit U-1 and U-2). The internal fusion is permanent and restricts all forms of movement at that location. She also sustained a “full thickness tear of the supraspinatus tendon” with “fraying and superficial tearing of the posterior-superior labrum” of her right shoulder (Exhibit W-5 and W-6) requiring an open acromioplasty to repair (Exhibit X-2,3 & 4). Plaintiff treated continuously from the date of the subject accident, when she received emergency treatment at Garden City Hospital (Exhibit L-1, L-2 and L-3), through September 30, 2003 when she sought the services of Dr. Maury R. Ellenberg (Exhibit AA-1) for continued neck and shoulder complaints. Dr. Ellenberg continued her prescription of Vicodin HP and Bextra which she takes to this date.

Plaintiff was initially off work from her non-physical job as a customer service specialist for three weeks (Deposition of Deborah Nicke, p. 89). She also was disabled from work beginning in the end of September 2001 – approximately seven (7) weeks prior to her first

surgery (Deposition of Deborah Nicke, p. 44) – until she was able to return part-time to a sedentary job as a payroll manager in October 2002 after her shoulder repair surgery (Deposition of Deborah Nicke, p. 25-26). Plaintiff's No Fault insurer, State Farm, purchased a special ergonomic chair which allowed her to work with restrictions (Deposition of Deborah Nicke, p. 29). She was incapacitated after each surgery and wore a brace for her neck from November 22, 2001 through the end of that year (Exhibit V).

Plaintiff testified she had a very active lifestyle before the accident and is unable to perform many of the activities she routinely performed before the accident (Deposition of Deborah Nicke, p. 168). In her history to Dr. Teck Mun Soo on November 1, 2001, Plaintiff complained she had "no quality of life" (Exhibit T-2). She can no longer collect, restore and sell antiques (Deposition of Deborah Nicke, p. 168), bowl (Deposition of Deborah Nicke, p. 172) or hike (Deposition of Deborah Nicke, p. 173), all things she did before the accident.

The list of activities Plaintiff engaged in before the accident that have been adversely affected by the injuries sustained in the motor vehicle accident is extensive (see Exhibit CC 1-10). The limitations on her life run the gambit of sports, recreation, hobbies, social activities, work in and around the home, activities with children, personal hygiene and a broad range of other activities and functions. Plaintiff's life course is affected because she is limited or cannot lift, bend, stoop, squat, sit, reach, pull, push, rotate or tilt her neck, lift her arm forward, to the side or back, make meals, open heavy drawers, sit or stand comfortably, dust, vacuum, scrub or clean her bath or kitchen, carry laundry or groceries, cut her lawn, tend her garden, enjoy life on a daily basis, live each day without worrying about what the future holds for her, or live each day without taking muscle relaxers, pain medication and anti-depressants.

Of the five (non-exhaustive) *Kreiner* factors, the trial court focused primarily (one might

say, exclusively) on its perception that duration of Plaintiff's impairment was too short (factor c) to constitute a serious impairment. The Court of Appeals, on the other hand, considered the nature and extent of Plaintiff's impairment (factor a) and the type and length of treatment required (factor b) and recognized that Defendants inflicted a harm upon Plaintiff which caused substantial injuries (herniated discs at C5-C6 and C6-C7 and a full thickness tear of the supraspinatus tendon on her right shoulder), which caused Plaintiff substantial pain, completely diminished her quality of life, limited all activities, and required substantial medical, medicinal, and therapeutic care and treatment including anterior cervical discectomy at C5-C6 and C6-C7 with bilateral foraminotomy with internal fusion at C5-6 and C6-7 with instrumentation and plating and an open acromioplasty to repair a torn rotator cuff of her right shoulder.

When viewed in the light most favorable to Plaintiff, the fact that Plaintiff was able to work through her pain and limitations at her sedentary jobs should not have been dispositive. As the cases cited above amply demonstrate, treating the perceived period of impairment as the primary factor, and/or to the exclusion of other factors, is inappropriate.

The trial court's failure to consider other factors including other *Kreiner* factors rendered the grant of summary disposition inappropriate. It is illustrative that, in reversing the trial court's grant of summary disposition to Defendants, the Court of Appeals implicitly instructed the trial court to consider, among other things, the significance of the surgeries which Plaintiff undertook in an effort to mitigate her pain and suffering. Plaintiff presented sufficient evidence to create a question of fact on the serious impairment threshold<sup>3</sup>.

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<sup>3</sup>Plaintiff contends that the Court of Appeals' decision doesn't go far enough in that Plaintiff presented ample evidence that she has sustained permanent residual injury: that a fusion of one's cervical vertebra [C5-C6 and C6-C7] will cause a permanent decreased range of motion seems patent. The decreased range of motion in Plaintiff's neck and shoulder comes into play in almost any activity or movement, a factor found to be significant and supportive of a finding of serious impairment in McDaniel, *supra*. Plaintiff did sustain a permanent serious impairment of

**2. The Court of Appeals did not err when it decided that the trial court's failure to consider whether the significance of the surgeries which Plaintiff undertook in an effort to mitigate her pain and suffering precluded the grant of summary disposition in favor of Defendants.**

It seems clear that the trial court focused on the fact that Plaintiff was only out of work for three weeks. In so doing, the trial court seemed to ignore substantial and compelling evidence regarding Plaintiff's significant injuries and the extensive surgeries required to mitigate Plaintiff's pain and suffering. As noted by the Court of Appeals, Plaintiff's treating surgeon opined that Plaintiff had no quality of life and that all activities would limit her, thereby requiring the performed surgeries.

While the Court of Appeals appears to have agreed with the trial court that the current state of Plaintiff's impairment fails to satisfy the *Kreiner* threshold, the Court concluded that the trial court failed to consider or appreciate that, before Plaintiff's surgeries, evidence of Plaintiff's lack of any quality of life and limitations in all activities did satisfy the *Kreiner* threshold. In other words, on its de novo review, a unanimous panel of three judges found that a question of fact existed sufficient to preclude summary disposition in favor of Defendants.

Defendants' focus on the trial court's use of the phrase "the totality of the circumstances" is not material. "The totality of the circumstances" is a phrase that can be interpreted to encompass a specific closed-end period or someone's entire life or any length of time in between. Plaintiff contends that the Court of Appeals recognized that the trial court couldn't see the forest for the trees, that is: the trial court's focus on "the totality of the circumstances" of Plaintiff's entire life kept the trial court from appreciating "the totality of the circumstances" which drove Plaintiff to endure significant surgeries in an effort to mitigate her substantial accident-related injuries. Stated another way, the Court of Appeals decided that the trial court did not, in fact,

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body function, not just a temporary serious impairment.

adequately or appropriately consider “the totality of the circumstances”.

**3. The Court of Appeals did not create and impose any separate and independent duty upon the trial court to determine whether Plaintiff sustained a “temporary” serious impairment of body function.**

Contrary to Defendant’s assertion, the Court of Appeals did not create and impose a separate and independent duty but, rather, correctly decided that the trial court erred when it focused on the duration of Plaintiff’s serious impairment to the exclusion of other factors including the non-exhaustive list of factors set forth in *Kreiner*. Even though the Court of Appeals chose to express its holding in terms of “permanent” and “temporary”, a fair reading of the decision suggests that the Court of Appeals applied existing precedent when it ruled that focusing on one factor to the exclusion of others is error. Although the Court of Appeals agreed with Defendants and the trial court that Plaintiff is no longer impaired as a result of her accident related injuries<sup>4</sup>, there can be no doubt that Court of Appeals disagreed with the trial court’s analysis that Plaintiff did not *any* serious impairment of body function *at all* and/or *for any significant period of time*.

**4. Because the Court of Appeals’ decision simply affirms *Kreiner*’s requirement to consider all factors and not one factor (duration) to the exclusion of others and *Kreiner*’s holding that an injury need not be permanent to satisfy the serious impairment threshold, the decision will not lead to an “erosion” of *Kreiner*.**

In essence, the holding in the Court of Appeals’ January 26, 2006 decision is that, viewing the evidence in the light most favorable to Plaintiff and in the face of the significant surgeries undertaken by Plaintiff, it was error in this case for the trial court to conclude Plaintiff did not sustain a statutory serious impairment of body function *at any time* subsequent to and as a

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<sup>4</sup>Again, Plaintiff contends that the Court of Appeals did not go far enough: the Court of Appeals ought to have reversed the trial court’s decision on the issues of residual impairment and/or permanent impairment, too.

result of her accident related injuries. In other words, the trial court got it wrong when it focused on the perceived duration of the impairment to the exclusion of all other factors. This decision is not clearly erroneous. The fact that a unanimous panel of appellate court judges came to a different conclusion on the same facts that were presented to the trial court demonstrates that questions of fact exist sufficient to preclude summary disposition in favor of Defendants.

The Court of Appeals held that the trial court erred when it failed to appreciate, consider, and/or give proper weight to the significant nature of Plaintiff's surgeries and/or the impairments which drove Plaintiff to undertake the surgeries. This ruling is completely consistent with, and does not conflict with, the decisions in Kreiner, Williams, and McDaniel. The instant unpublished decision merely serves as another reminder to the trial courts not to focus only on the perceived duration of the impairment but to consider and apply proper weight to numerous factors. The decision will most certainly not cause material injustice (to the contrary, it may actually lead to a modicum of justice).

#### **CONCLUSION AND RELIEF REQUESTED**

Although the Court of Appeals decision is couched in terms of "permanent" and "temporary", the essence of the decision is that the evidence upon which the trial court focused and relied was inconsistent with the interpretation of MCL 500.3135(7) set forth in McDaniel, Williams, and Kreiner. Therefore, the Court of Appeals correctly held that the trial court's order granting summary disposition to defendant was and is error and this Court ought deny Defendant's application for leave to appeal.



WHEREFORE, Plaintiff/Appellee DEBORAH SUE NICKE respectfully asks this Honorable Court to Deny Defendants' Application for Leave to Appeal the January 26, 2006 decision of the Court of Appeals.

ALSPECTOR, SOSIN, BARSON,  
SCHAFER & SOSIN, P.C.

By: 

ROBERT M. SOSIN (P35414)<sup>5</sup>

Attorneys for Plaintiff/Appellee

DATED: April 3, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause via:

☒ U.S. Mail, postage paid      ☐ FAX  
☐ Hand-Delivered      ☐ Federal Express  
☐ Other \_\_\_\_\_

in envelope(s) addressed to each of the attorneys of record herein (or to any party *in pro per*) at their respective addresses disclosed on the pleadings, on the 3<sup>rd</sup> day of April, 2006.



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<sup>5</sup>This Brief was written with the substantial assistance of attorney Gabriel B. Locher (P43725).